

Peter Vitalie Company, Inc. and Sterling Billiard Company, Inc. and David E. Hudson. Case 11-CA-15241

March 2, 1994

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND TRUESDALE

On June 29, 1993, Administrative Law Judge Richard J. Linton issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings,¹ findings,² and conclusions and to adopt the recommended Order as modified.³

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Peter Vitalie Company, Inc. and Sterling Billiard Company, Inc., Rosman, North Carolina, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for the first word in paragraph 1.

“1. Cease and desist from”

2. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

¹ The Respondent asserts in its exceptions that the judge's rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the judge's decision and the entire record, we are satisfied that these contentions are without merit.

² The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

³ We shall modify the judge's recommended Order to add the words “and desist from,” and we shall substitute a new notice with language conforming to that in the judge's recommended Order.

To form, join, or assist any union
To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge or otherwise discriminate against any employee for engaging in concerted activities protected by the National Labor Relations Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer David E. Hudson immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to seniority or any other rights or privileges previously enjoyed, and WE WILL make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, less any net interim earnings, plus interest.

WE WILL notify David E. Hudson that we have removed from our files any reference to his November 25, 1992 discharge and that the discharge will not be used against him in any way.

PETER VITALIE COMPANY, INC. AND
STERLING BILLIARD COMPANY, INC.

Paris Favors Jr., Esq., for the General Counsel.
Andee Atkisson, of Rosman, North Carolina, for the Respondent.

DECISION

STATEMENT OF THE CASE

RICHARD J. LINTON, Administrative Law Judge. This is a discharge case. Finding that Peter Vitalie Company, Inc. (PVC, the Company, or Vitalie) fired David E. Hudson on November 25, 1992, because of its belief that he had instigated a protected activity by employees to approach management about obtaining the employees' paychecks the Wednesday before a 4-day Thanksgiving holiday, and that PVC failed to demonstrate that Hudson was fired for insubordination or would have been fired in any event, I order Respondent PVC to reinstate Hudson and to make him whole, with interest.

I presided at this 1-day trial on May 3, 1993, in Brevard, North Carolina, pursuant to the January 15, 1993 complaint and notice of hearing (complaint) issued by the General Counsel of the National Labor Relations Board through the Acting Regional Director for Region 11. The complaint is based on a charge filed in Case 11-CA-15241 by David E. Hudson, an individual (Hudson or Charging Party), on December 4, 1992, against Peter Vitalie Company, Inc. and Sterling Billiard Company, Inc. (Sterling). I, generally, shall refer to Vitalie and Sterling collectively as Respondent, Company, or PVC.

In the Government's complaint, the General Counsel alleges that Vitalie and Sterling are a single-integrated employer and that Respondent PVC violated Section 8(a)(1) of the Act by firing Hudson (employed by Vitalie) on November 25, 1992. Admitting certain facts, including the November 25 discharge of Hudson, PVC denies violating the Act. PVC defends on the basis that Company's president, Gilbert Atkisson, fired Hudson as a spontaneous response when Hudson was insubordinate to Atkisson on the plant floor.¹

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Company, I make the following

FINDINGS OF FACT

I. JURISDICTION

Vitalie and Sterling each is a North Carolina corporation operating a factory in Rosman, North Carolina, where each manufactures billiard, pool, and snooker tables. During the past 12 months Vitalie and Sterling each shipped goods valued at \$50,000 or more directly to points outside North Carolina. In its March 29, 1993 decision the Board, affirming the decision of Administrative Law Judge William N. Cates, found "that Vitalie and Sterling collectively constitute a single-integrated business enterprise and a single employer within the meaning of the Act." *Peter Vitalie Co.*, 310 NLRB 865, 865 (1993).

In the instant case the parties stipulated (1:16) that the facts respecting Vitalie and Sterling were the same or substantially the same as existed at the time of the hearing before Judge Cates.² I find that, as alleged, Vitalie and Sterling constitute a single-integrated business enterprise and a single employer. I further find that Vitalie and Sterling, individually and collectively, are an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Work Force and Witnesses

Although Vitalie and Sterling may have been combined into one company as of the first of 1993 (1:8, 113), in November 1992 the two companies were separately incorporated firms. That fact has little relevance at this stage, but it assists in understanding the testimony when witnesses refer to the Vitalie side or the Sterling side of the factory. No wall separated the two sides in November, and the division was by an imaginary line which followed some support beams. (1:33.) In November Vitalie and Sterling had a combined total of about 30 employees, with something over half of those working on the Vitalie side. (1:22, 28-29.)

The pleadings establish that Gilbert L. Atkisson is PVC's president and that David Robinson is vice president, manufacturing. Ricky Chapman is one of the supervisors reporting to Robinson. (1:22, 157.) Stephen Edwards apparently serves as the leadperson over the carving and turning departments where Hudson worked. (1:157, 207.) Even so, it appears that

Edwards never exercised jurisdiction over Hudson because Robinson told Edwards that Hudson was doing just fine on the turning lathe and needed no training. (1:208, 217.) Hudson operated a lathe (1:21) in the turning department (1:47), and primarily was supervised by David Robinson. (1:22.) President Atkisson acknowledges that Hudson is a very talented person whose work, as distinguished from his conduct as an employee, was of excellent quality. (1:164, 176-177.)

Although a single shift operates the plant from 7 a.m. to 3:30 p.m., Hudson worked a 7-hour shift from 8 a.m. to 3:30 p.m. on a special arrangement with PVC. (1:24-25, 72-73, 76.) Hudson was one of the most senior and highest paid of PVC's employees. (1:22-23, 84, 171-172.) The employees have a morning break of 15 minutes beginning at 9 a.m. (1:181.) The lunch period is for 30 minutes, from 11 to 11:30 a.m. (1:28, 111, 117.) A buzzer sounds twice at the end of the lunch period, once at 11:29 a.m. and a second time at 11:30 a.m. (1:182.) The area near Brevard consists of small towns. About a quarter of the work force goes home for lunch. (1:77.) Hudson is one of those who do. (1:29.) When leaving for lunch, employees do not have to clock out. (1:38.)

The General Counsel called Charging Party Hudson and cutting department employees (Larry) Dwayne Morgan and Al Christopher Galloway, and rested. (1:149.) (Appearing in response to subpoenas from the General Counsel, Morgan and Galloway gave no pretrial affidavits and declined to meet with the General Counsel in preparation for the trial, although they did meet with Andee Atkisson.) (1:121, 144.) PVC then moved for dismissal on the basis that the General Counsel had failed to show that protected activity was a motivating reason in Hudson's discharge. (1:149.) After the parties argued their positions, I denied Respondent's motion. (1:152-153.)

I then informed Respondent's representative, Executive Vice President Andee Atkisson, that PVC could rest on its motion at that point or proceed. I stated that if PVC proceeded with its case-in-chief, then, under my understanding of the law, PVC would be deemed to have waived its motion to dismiss, and in reaching my decision I would consider not simply the evidence as of PVC's motion, but the entire record. (1:153.) *Greco & Haines Inc.*, 306 NLRB 634 (1992); *Postal Service Board of Governors v. Aikens*, 460 U.S. 711 (1983); *Reed v. State*, 794 S.W.2d 806, 809 (Tex. Crim. App. 1990). The sufficiency of a prima facie case is tested by resting on a motion to dismiss. See, for example, *American Bakeries Co.*, 280 NLRB 1373, 1374 (1986).

For a time the Board ruled that, in assessing whether the General Counsel had established a prima facie case, only the General Counsel's evidence would be considered. This line of cases began with *Hillside Bus Corp.*, 262 NLRB 1254 (1982). Under *Hillside Bus*, apparently, even an admission by the respondent during the respondent's case-in-chief would not be available to help establish the General Counsel's prima facie case. The Board silently overruled the *Hillside Bus* line of cases in *Golden Flake Snack Foods*, 297 NLRB 594, 595 fn. 2 (1990). *Electronic Data Systems Corp.*, 305 NLRB 219, 262 (1991).

Recently, the Sixth Circuit stated what appears to be the equivalent of the Board's old *Hillside Bus* rule. *NLRB v. Vemco*, 989 F.2d 1468, 1479 footnote 12 (6th Cir. 1993). I respectfully suggest that the Sixth Circuit's statement in

¹ Unless I indicate otherwise, all dates are for 1992.

² References to the one-volume transcript of testimony are by volume and page. Exhibits are designated GCX for the General Counsel's and RX for Respondent's.

Vemco's fn. 12 does not express the correct procedural rule. *Postal Service Board of Governors v. Aikens*, supra.

B. *David Hudson Fired November 25, 1992*

1. Events outside the office door

To add Friday, November 27, to the Thanksgiving holiday and to therefore have a 4-day holiday weekend, PVC's employees voluntarily worked the previous Saturday. (1:115, 119, 134.) Paydays are every other Friday. (1:24; GCX 9 at 2.) That Friday was a payday. Initially employees understood they could come in that Friday and receive their paychecks. (1:90.) However, the morning of Wednesday, November 25, word circulated among employees that paychecks would not be distributed until the following Monday. Employees spoke with the supervisors. Leadperson Stephen Edwards testified that Hudson and several other employees asked him to talk with the supervisors about the problem. Edwards spoke to David Robinson and Ricky Edwards and reported the employees' concern. They told Edwards that they had already checked with the office and determined that the checks would not be issued until the following Monday. Edwards reported this to Hudson and the others, suggesting that they drop the matter. This was before the 9 a.m. break. (1:210, 214, 215.) Atkisson confirms that sometime that morning David Robinson reported to him that the employees were asking if they could receive their paychecks that day. After conferring with other management, Atkisson told Robinson that paychecks would be distributed on Monday if the employees took Friday as a holiday. (1:183.)

The employees did not drop the matter. At the morning break they discussed the matter and many decided to approach the Atkissons and Robinson on the subject at lunchtime. Shortly before lunch they decided to make the approach at the end of the lunch period. (1:27–28.) (Larry) Dwayne Morgan also was active in coordinating with other employees about going to the office at lunchtime. (1:116, 135.)

Shortly before the lunch period ended, Hudson arrived back at the plant. There is some dispute about the exact time and whether the employees gathered during the lunch period or on PVC's time. I hesitate to resolve that dispute, for it is immaterial whether the employees gathered on their time or PVC's time to confer with management over their desire to receive their paychecks that Wednesday rather than the following Monday. Also, I need not address the evidence concerning whether PVC actually had a policy or past practice that covered the situation of a day off for everyone on a Friday payday. (I note that the evidence is mixed concerning this matter.)

When Hudson returned from lunch toward the end of the lunch period and entered the plant, he learned that several employees had decided not to go through with the plan because Atkisson was in a "foul" mood. (1:29–30, 88.) When Atkisson is in a bad mood, Hudson testified, he curses with more profanity than usual. (1:110.) Atkisson concedes that he occasionally curses, and even "swears" or "takes the Lord's name in vain" "quite often." (1:161–163.)³ According to Atkisson, however, he does so at a situation and never at an

employee. He strives not to use "a certain four-letter word" in front of females. (1:162–163.)

After hearing the "foul" mood news and proceeding on into the plant, Hudson saw a group near the office door. Some in the group also said Atkisson was in a bad mood. About that time, around 11:25 or 11:26 a.m., Dwayne Morgan, Christopher Galloway, and others walked up. All were standing a few feet from the office door. Around the time of the first buzzer at 11:29 a.m., Hudson told the approximately seven or eight employees that there were not enough employees present to execute the plan. Suggesting that they go to their work areas and talk later with Robinson, Hudson turned and started walking into the plant. (1:30–32.)

At about that moment the 11:30 a.m. buzzer sounded and President Atkisson opened the office door and walked out. (1:31, 93–94, 96.) Atkisson reports that by habit he "squirts" through the door into the plant "the minute we go back to work or within a few minutes." He places the time here as about 11:35 to 11:40 a.m. (1:155, 182.) Dwayne Morgan places the time as about 11:45 a.m. (1:117, 135.) Consistent with Hudson's description, I find that Atkisson walked through the door as the second buzzer sounded at 11:30 a.m.

Although I find the time as just described, I digress for a moment to summarize a point in Atkisson's testimony. According to Atkisson, on this occasion he was in the office when, about 11:35 a.m., he observed, through the office window, David Hudson drive up, "late as usual." (1:154.) By "as usual," Atkisson explains that he has watched Hudson return late from lunch almost on a daily basis for 4 to 5 years. Although he never personally spoke to Hudson about his tardiness, the supervisors did, Atkisson asserts. Moreover, Hudson's personnel file has seven or eight citations in it, Hudson talks constantly with other employees, and twice that very morning Atkisson had observed Hudson speaking with groups of employees. In fact, 2 years earlier Atkisson had wanted to fire Hudson over his tardiness from lunch, but Robinson dissuaded him from doing so. (1:156, 165–167, 178–179.)

When Atkisson walked through the door and into the plant, he testified his intention was merely "to cite" Hudson for being late from lunch, not to fire him. (1:156, 168–169, 194, 195.) Depending on when he was asked at trial, Atkisson testified that he carried with him (1) a written warning form completed as to tardiness from lunch (1:156) or (2) a blank form which he filled out that day immediately after he fired Hudson (1:173.) In a moment I shall describe the termination form (GCX 2) which is in evidence. As the form reflects on its face (GCX 2), and as Hudson testified (1:47), Hudson's copy was mailed to him.

Resuming my description, I note that as Atkisson walked out he raised his voice. Hudson, looking back, observed Atkisson pointing at Morgan and Galloway and toward the exit door. Hudson proceeded to the cutting department to cut some lumber. (1:32–32, 37, 96–97.) Although there are some mostly immaterial differences in the testimony of Morgan, Galloway, and Atkisson, Atkisson acknowledges that when he came out he saw a group which included Hudson, Morgan, Galloway, and others. The group dispersed immediately when he appeared. Atkisson followed Morgan and Galloway. Catching up with them about 20 feet later, Atkisson asked them what was going on. Morgan said they were concerned

³ "Their cursing is painful to hear. Sir." (27:15.)

about getting their paychecks that Wednesday before Thanksgiving. Atkisson explained that it was company policy to pay on Monday following a Friday holiday. Atkisson told them they were free to return to work or "go to the house." (1:155-156, 184-185.) "Go to the house" is an idiom meaning, Atkisson testified, that the person is fired. (1:192.) According to Galloway, Atkisson did not seem upset with them personally, but was upset about rumors in the plant. (1:144.) Rather more emphatic, Morgan asserts (1:120): "Yeah, he was upset. I ain't going to lie to you. He was mad."

Atkisson denies that anyone told him that the group of employees outside the office door had gathered to see him about the paychecks. (1:182-183.) Even so, Atkisson admits that earlier that morning Vice President David Robinson had reported that about a dozen employees had asked whether the employees were to receive their paychecks that day. (1:183.) After he explained the policy to Morgan and Galloway, Atkisson testified, he assumed he would have to repeat that explanation to Hudson. (1:169, 183.)

2. Atkisson confronts Hudson

Hudson testified that he was picking up a board for cutting when Atkisson walked up. Hudson could see that Atkisson was angry. Although Hudson's description is a bit disjointed, his version is substantially as follows, with "H" being Hudson and "A" being Atkisson (1:33-34, 41-43, 97-103):

ATKISSON: David, I ought to fire you. You're starting trouble again.

HUDSON: How am I causing trouble?

A: The employees are banding together demanding their paychecks.

H: Well, Gil, we were just wanting a good explanation as to why we couldn't receive our paychecks. We're just wanting our paychecks to where we can pay bills and have Thanksgiving dinner. That's all we were wanting. We weren't trying to stir up no trouble. We were just wanting a fair explanation because one wasn't given to nobody.

A: Well, I ought to just fire you.

H: Well, that's up to you.

A: All right, you're fired. Get out the goddamn door (pointing to the exit door).

H: Well, if you don't mind, I'd rather have David Robinson or Ricky Chapman tell me this. If you will have Ricky Chapman or David Robinson come tell me, I'll accept it.

A: You dumb sonofabitches don't listen to a thing I say. I own the plant and I own them and I'll do as I damn well please.

At that point Atkisson took a couple of steps toward Hudson who, thinking Atkisson was about to hit him, balled up his fists. Atkisson stepped back, and Hudson lowered his hands. Atkisson then told Hudson, "You're fired. Get out the damn door now." (1:34-35, 100-101.) That ended the incident, and after telling his coworkers goodbye Hudson left the plant.⁴

⁴ "If one man prays and another curses, whose voice will the Lord hear? Sir." (34:24.)

At trial Hudson explained that he referred to Robinson and Chapman because at a company meeting some months earlier Atkisson had told employees that he never fired anyone or laid them off but left that up to his supervisors. (1:43-44, 100.) Atkisson denies saying that at any meeting, and asserts that as a general rule he leaves such matters to his supervisors, but he does not exclude himself from ever exercising that responsibility. (1:189.)

According to Atkisson, he began the conversation with Hudson by saying that he was tired of seeing him "in a pile of people" all day. Atkisson asked what Hudson's problem was. Hudson replied that Atkisson was not treating the people right, that "some of us need our money for Thanksgiving and to pay bills." Atkisson proceeded to explain that the Company pays on Monday after a Friday holiday. Not sure of what other words were exchanged, Atkisson asserts he then told Hudson that if he was not happy he was free to leave. Hudson said that the only persons who could ask him to leave the plant are David Robinson and Ricky Chapman. "Excuse me," Atkisson said, "You're fired right now. Leave the building." That ended the incident.

Atkisson testified that when Hudson said only Robinson or Chapman could fire him, Atkisson considered Hudson's statement to be belligerent, argumentative, and insubordinate. "What he was telling me is as the president of the company, I had no right to fire him is what he was telling me in my opinion." (1:191-192.) "Free to leave" is the same as "free to go to the house," which means "You're fired." (1:192.) Atkisson testified, and wrote in a pretrial affidavit, that when he told Hudson he was free to go (meaning fired), Hudson said that "only Ricky and David can fire me." At that point Atkisson flatly said, "You're fired." (1:157-159, 167-170, 189-193.)

Although Atkisson concedes that his stance probably became threatening after Hudson said Atkisson could not ask him to leave the building, he asserts that he never observed Hudson make a fist. Although Atkisson denies walking up close to Hudson, he concedes that he was about a foot from him because of the noise in the area. (1:159, 161, 194.) Although other employees were in the general area, they were too far away, in Atkisson's opinion, to overhear anything that was said. (1:158.)

3. The termination notice and related matters

As I noted earlier, PVC later mailed a copy of the termination report to David Hudson. Although the form appears to cite three reasons for discharging Hudson, throughout this case, from its answer forward, PVC asserts that Hudson was fired for one reason only: insubordination. Thus as I have summarized, Atkisson clearly states that when he approached Hudson after lunch he intended only to cite him for tardiness, not to fire him. The discharge, according to Atkisson, was a spontaneous response to Hudson's insubordination of, in Atkisson's view, challenging his authority. Indeed, Atkisson testified (1:170, 193-194) that the discharge was a surprise to both Hudson and him. When the General Counsel at trial expressed his understanding that PVC was defending on the basis that past warnings were also a basis for the discharge, Respondent's representative, Andee Atkisson, stated (1:200): "No, sir. Where did you get that impression? These are your exhibits, not mine. He was fired for insubordination."

Arguably the abandoned reasons on the termination report could be considered a shifting of purported grounds. I need not pause to find whether shifting occurred. Even so, I briefly shall mention the termination report and other alleged reports.

Looking first at the termination report (GCX 2), I note that Atkisson has checked three "violation" boxes: attitude, insubordination, and tardiness. Although the "Other" box is not checked, Atkisson wrote on the lines provided by it, "Considered factory rumor spreader." Under a section reserved for the company's statement, Atkisson wrote: "David Hudson has been a prime force in keeping factory in constant turmoil. Constantly late from lunch." Because Hudson was not interviewed in relation to the form, the section for the employee's position is blank. Finally, under the space for action to be taken, Atkisson wrote, "Employee terminated."

On cross-examination Atkisson could not give a specific rumor for the "rumor spreader" tag he placed on Hudson, and admitted that he added that statement "without a specific rumor" in mind. Nevertheless, rumors by Hudson were a constant problem which kept the plant in constant turmoil, and that all this stopped when Hudson left. (1:175-176). Atkisson does not address whether any "turmoil" stopped after Hudson's discharge out of fear by employees of receiving the same punishment.

In evidence are six other warning notices respecting Hudson. They are for either tardiness or talking ranging in dates from March 10 (GCX 3) to October 8, 1992 (GCX 8). One (GCX 7), for arriving 10 minutes late from lunch on September 24, 1992, is signed by Atkisson who wrote that he observed the tardiness, and that "David Robinson says he [Hudson] comes back late at least 3 times a week." Robinson did not testify, and Atkisson concedes that he did not discuss the matter with Hudson. (1:196.) None is signed by Hudson, who testified that he received only one (GCX 3), for talking instead of working on March 10, and was not "jumped on" or spoken to about the others. (1:58, 64, 77, 81.)

I need not resolve this. Probably both parties are correct here. Although Hudson was shown only one warning, the other reports were prepared and placed in Hudson's personnel file but never shown to him. Moreover, whatever comment was made to Hudson was too light to be recognized by him even as a caution. Hudson, who concedes that he was tardy once or twice, testified that he offered to work late to make up for it, but Robinson told him not to worry about it. (1:38, 60.) There are timecards in evidence on the matter because employees do not clock out at lunch. (1:38.) On one occasion at a plant meeting Robinson told all employees not to be tardy when returning from lunch. (1:61.) Indeed, PVC's employee handbook then in effect states (GCX 9 at 1): "Tardiness will not be tolerated . . . Habitual tardiness . . . will result in termination." PVC's own documents reflect that Respondent never felt concerned enough about tardiness to confront Hudson about the matter and have him sign his receipt for a written warning. Moreover, none of the disputed warnings says anything about spreading rumors.

I further note Hudson's testimony that when Atkisson confronted him on November 25, Atkisson never mentioned anything about tardiness. (1:99.) Indeed, Atkisson's own version reflects that nothing was said about tardiness. Atkisson concedes that when he approached Hudson he referred to Hud-

son's having been in a "pile" of people all day, asked what the problem was, and was told about the paychecks.

C. Discussion

1. Governing law

When employees join to present a grievance concerning wages, hours, or working conditions to their employer, their action is concerted. *Transpac Fiber Optics*, 305 NLRB 974 (1991). Unless the concerted action is shown to have been conducted in an abusive manner or purpose, it is protected under Section 7 of the Act. *Delta Health Center*, 310 NLRB 26, 43 (1993). The employer must have known, or believed, that the action was part of group action or on behalf of a group of employees. *Manimark Corp.*, 307 NLRB 1059 (1992). When such concerted protected activity is a moving reason for an employer's discipline imposed on an employee, then that adverse action violates Section 8(a)(1) of the Act unless the employer, as an affirmative defense, demonstrates that it would have taken the same action notwithstanding the protected activity. *Manimark Corp.*, supra.

2. Credibility resolved; conclusions stated

Generally, I credit David Hudson over all witnesses, including, where conflicts exist, the two other witnesses called by the General Counsel, Dwayne Morgan and Christopher Galloway. Although Hudson may have hedged on the number of times he has been tardy returning from lunch, he generally testified persuasively. By contrast, Morgan and Galloway, who failed to meet with the General Counsel before the trial, but who did confer with PVC's trial representative, struck me as testifying in a manner which they perceived would please their employer.

I have barely mentioned Stephen Edwards or his testimony. The only testimony of Edwards which I credit is that which is consistent with the other credited evidence. Edwards devoted most of his testimony describing supposed shortcomings of Hudson while praising his own efforts on behalf of PVC. I find that Edwards formed his testimony for the purpose of currying favor with the owners of his employer. I generally do not believe Edwards.

Turning now to President Gilbert Atkisson, I note that not all of his testimony is inconsistent with that of Hudson's. To the extent it is inconsistent, I do not credit Atkisson. No doubt Atkisson did see Hudson drive by on his return from lunch. That time, I find, would have been just a few minutes before 11:30 a.m. Hudson was making a special effort that day to return before the end of the lunch period and was not late. (1:62, 87.) Atkisson was angry, but his anger, I find, was caused not by any tardiness on Hudson's part (because Hudson was not late), but by Atkisson's belief that Hudson was responsible for stirring up the employees to press for their payroll checks that day, Wednesday, rather than waiting until the following Monday.

Atkisson suggests that his version of the confrontation with Hudson is correct because he did not fire Dwayne Morgan. (1:172.) But Atkisson did not fire Morgan because, I find, Morgan was not, in Atkisson's view, the instigator. Thus, Atkisson went looking for the presumed instigator. On finding Hudson, Atkisson's unlawful animus spilled out in the expression that he ought to fire Hudson for starting trouble again. When Hudson asked what trouble, Atkisson clear-

ly described the cause of his anger—the employees were “banding together demanding their paychecks.” Even under his own version, Atkisson places the group concern, and Hudson’s participation in it, at the heart of why Atkisson was confronting Hudson. However, I find that the correct version is the one given by Hudson.

I find that employees, and possibly more than a single group of employees, were concerned when they learned they would not receive their paychecks until the Monday after Thanksgiving. They decided the morning of November 25 to approach the Atkissons that day at the end of the lunch period and seek a solution to the problem. David Hudson was part of the group discussion. President Atkisson admits that he was told that a dozen or so employees that morning had expressed this concern to Vice President David Robinson.

Atkisson denies that when he walked forth from the office to enter the plant at the 11:30 a.m. buzzer that he was aware the group had gathered for the purpose of discussing this concern with him. Not crediting Atkisson’s denial, I find that he either knew or immediately suspected that such was the purpose of the group. In any event, Atkisson concedes that he immediately learned from Dwayne Morgan that such was the concern. From there Atkisson went to hunt down David Hudson.

On locating Hudson, Atkisson’s remarks, as I have found, demonstrate that Atkisson (1) knew the employees had banded together over the paycheck issue and that (2) he blamed David Hudson for stirring up the employee concern over the matter. In the exchange which followed, Atkisson, obviously teetering on the brink of discharging Hudson, and after twice saying he ought to fire Hudson, did just that when Hudson finally said that such an action was up to Atkisson.

In so discharging David Hudson, I find that President Atkisson was motivated by Hudson’s perceived leadership role in the protected concerted activity of PVC’s employees. I disbelieve Atkisson’s suggestion (1:172–173) that the paycheck matter played no part in his decision to discharge David Hudson. Atkisson’s assertion (1:172) that none of the others involved were fired merely reinforces Hudson’s credited version that Atkisson held Hudson responsible for the employees’ group activity. Finally, I find that Respondent failed to demonstrate that it would have fired David Hudson regardless of any protected activities by Hudson. Consequently, I find that, as alleged, Respondent PVC violated Section 8(a)(1) of the Act when it fired David Hudson the morning of November 25, 1992.

CONCLUSION OF LAW

By discharging David Hudson the morning of November 25, 1992, Respondent PVC has engaged in unfair labor practices affecting commerce within the meaning of Sections 8(a)(1) and 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having discriminatorily discharged an employee, the Respondent it must offer reinstatement and make the employee whole for any loss of earnings and other benefits, computed

on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Nothing in David Hudson’s conduct would bar his reinstatement. His request that Atkisson have either Vice President David Robinson or Supervisor Ricky Chapman advise him of his discharge was nothing more than a misinterpretation of statements made at a company meeting a few months earlier. Hudson’s request can be considered nothing more than a minor impropriety occurring after he had been fired unlawfully. Hudson’s request must be assessed in light of the unlawful conduct which provoked it. When so compared, Hudson’s response falls far short of the opprobrious conduct necessary to forfeit his right to reinstatement. Similarly, when Hudson balled up his fists (an action Atkisson admittedly never observed), it was an instinctive, defensive, and temporary reaction to Atkisson’s own movement toward him. Assuming a posture of self-defense in response to assaulting movement does not disqualify Hudson for reinstatement.

Although this case is the second finding of an unlawful motivation violation by the Respondent, the General Counsel does not seek a broad remedial order, and I shall not provide one.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁵

ORDER

The Respondent, Peter Vitalie Company, Inc. and Sterling Billiard Company, Inc., Rosman, North Carolina, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any employee for engaging in concerted activities protected by the National Labor Relations Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer David E. Hudson immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

(b) Remove from its files any reference to the unlawful discharge and notify David E. Hudson in writing that this has been done and that his discharge will not be used against him in any way.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records

⁵If no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its plant in Rosman, North Carolina, copies of the attached notice marked "Appendix."⁶ Copies of the notice, on forms provided by the Regional Director for Region

⁶If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.